STATE OF MICHIGAN

IN THE SUPREME COURT

JUSTINE MALDONADO,

Plaintiff-Appellee/
Cross-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellant/
Cross-Appellee,

and

DANIEL P. BENNETT,

Defendant.
_____/

Supreme Court No. 126274

Court of Appeals No. 243763

Lower Court No. 00-018619-NO

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
Attorneys for *Amicus Curiae*
American Civil Liberties Union
Fund of Michigan
60 West Hancock Street
Detroit, MI 48201
(313) 578-6814

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ACLU's answer: Yes.

Trial court's answer: The trial court did not directly address this question.

II. DID THE CIRCUIT COURT PUNISH MS. MALDONADO AND HER ATTORNEYS UNDER AN UNCONSTITUTIONALLY VAGUE STANDARD, AS FORBIDDEN BY *GENTILE V STATE BAR OF NEVADA*, 501 US 1030, 1048 (1991)?

ACLU's answer: Yes.

Trial court's answer: No.

III. DOES MCL 780.623(5), A STATE STATUTE LIMITING PUBLICATION OF INFORMATION ABOUT AN EXPUNGED CONVICTION, PROVIDE AN ALTERNATIVE BASIS FOR PUNISHING STATEMENTS MADE BY MS. MALDONADO AND HER ATTORNEYS?

ACLU's answer: No.

Trial court's answer: While the trial court did not base its ruling on MCL 780.623(5), it apparently thought the statute was relevant.

IV. DID THE CIRCUIT COURT ERR IN DISMISSING PLAINTIFF'S CASE BASED UPON AN *ASSUMPTION* THAT THE PRETRIAL PUBLICITY WOULD JEOPARDIZE DEFENDANTS' RIGHT TO A FAIR TRIAL WHERE VOIR DIRE WOULD HAVE REVEALED WHETHER THE PUBLICITY *ACTUALLY* DEPRIVED DEFENDANTS OF THEIR RIGHT TO A FAIR TRIAL?

ACLU's answer: Yes.

Trial court's answer: No.

STATEMENT OF INTEREST

The American Civil Liberties Union of Michigan is the Michigan affiliate of a nationwide nonpartisan organization of over 400,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the United States Constitution. The American Civil Liberties Union Fund of Michigan is the legal and educational wing of the Michigan ACLU. Among the rights that the ACLU vigorously seeks to protect are the right to free speech and the right to a fair trial. The ACLU Fund of Michigan frequently provides direct representation or files *amicus curiae* briefs in state and federal court on a wide range of civil liberties and civil rights cases. The case at bar raises important free speech and fair trial issues, including whether the trial court violated the First Amendment rights of plaintiff and her attorneys by dismissing plaintiff's lawsuit based on pre-trial statements to the media.

STATEMENT OF FACTS

Complaint and initial evidentiary ruling.

In 1995, Ford superintendent Daniel Bennett was convicted of indecent exposure after he exposed himself to three teenage girls while driving a Ford vehicle down I-275. 8/21/02 Op. at 2. After his conviction, he continued to work as a superintendent at Ford's Wixom plant.

In June of 2000, Justine Maldonado initiated the first of four sexual harassment lawsuits against Ford Motor Company and her supervisor, Bennett. Ms. Maldonado alleges, among other things, that Bennett exposed himself to her and demanded oral sex.

In the early phases of proceedings, Bennett's conviction had not yet been expunged. Nevertheless, on January 19, 2001, Judge Kathleen MacDonald granted a motion to exclude evidence of Bennett's conviction from Ms. Maldonado's trial. She held that it was inadmissible character evidence in claims against Bennett, and that its prejudicial nature exceeded its probative value in claims against Ford. 1/19/01 Tr. pp. 4-7. The Judge pointed out that she might reconsider her ruling as to Ford when the case was closer to trial:

> My ruling right now is that it will not be allowed even as to notice to Ford.... I hesitate as to Ford Motor. My concern here is that it's so prejudicial. And second that there may be ... means of proving notice other than using his conviction. If there's not, then I may reconsider...

1/19/01 Tr. pp. 7-8.

Pre-trial publicity.

Lawyers for Ms. Maldonado, Bennett, and Ford all communicated with the press during the pre-trial phase of this case. Media communications (and coverage) clustered around key developments in litigation against Ford and Bennett.

The first cluster of coverage began in Fall of 2001, around the time that two new plaintiffs filed sexual harassment suits against Ford and Bennett. Maldonado's attorneys issued a press release describing recent developments in ongoing litigation against these defendants. They repeated numerous women's complaints of sexual harassment by Bennett and information about his 1995 conviction. 9/11/01 Press Release; Attachment C to 8/21/02 Opinion.

Press coverage in Fall of 2001 repeated information about Bennett's conviction. It also included a statement wherein Bennett's attorney, Sam Morgan, "called the lawsuits lies filed by women looking for a way to make their jobs easier or to make money." 10/10/01 United Press International article, Def. 7/9/02 Submission of News Articles.

Expungement of Bennett's conviction.

Bennett's conviction was expunged on November 9, 2001. 8/21/02 Op. at 2.

Further pre-trial publicity and denial of defendants' request for a gag order.

The second cluster of publicity stems from a May 17, 2002 evidentiary hearing in front of Judge Giovan.[1] He was asked to decide whether to admit testimony of other women working at Ford, and to reconsider Judge MacDonald's refusal to admit Bennett's conviction into evidence. The media circulated stories referring to Bennett's expunged conviction, as well as a statement by Bennett's attorney that "Maldonado and the other women suing Ford are lying about the harassment." 6/12/02 MetroTimes article; Ex. C to Def. Joint Motion to Dismiss.

At an in-chambers discussion on May 17, 2002, Defendants' counsel requested a gag order directing plaintiffs' attorneys not to publicize Bennett's expunged conviction. 8/21/02 Op.

[1]Judge Giovan was reassigned to this case after Judge MacDonald was assigned to another division.

at 8-9. Plaintiff's attorney George Washington told Judge Giovan that "he and his client had every right to continue to publicly disclose the fact of the conviction." *Id.* at 9. The court declined to do issue a gag order because "the Rules of Professional Conduct govern what counsel can say about pending litigation . . . without the need for reinforcement by the court." *Id.* at 9 n.4.

Final evidentiary ruling.

On June 21, 2002, Judge Giovan refused to modify the earlier order excluding Bennett's conviction from evidence. At the hearing, when it came to his attention that counsel were being quoted by the press, he said:

> I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client.

6/21/02 Tr. pp. 29-30.

Protests outside of Ford.

On June 26, Ms. Maldonado joined a group of people protesting sexual harassment outside of Ford's World Headquarters. Attorney Jodie Masley (who works for the law firm representing Maldonado) also joined the protest. Some of the protesters carried large signs telling Ford to "Stop Sexual Harassment," "Fire Dan Bennett," and to "Stop Buying Judges." 6/26/02 NBC Broadcast, Ex. F. to Def. Joint Motion to Dismiss. Some protesters also handed out flyers (authored by the Justice for Justine committee) which described Maldonado's complaint and Bennett's conviction, and encouraged attendance at Maldonado's trial on July 8,

2002. See Attachment A to 8/21/02 Op.[2]

Television cameras filmed the protesters and their signs complaining of sexual harassment at Ford. 6/26/02 NBC Broadcast, Ex. F. to Def. Joint Motion to Dismiss. Ms. Maldonado told reporters of her determination to fight sexual harassment, adamantly noting that she wouldn't stop the fight even if Judge Giovan decided "to dismiss [her] case with prejudice" because "we don't act the way ...he sees fit." 8/21/02 Op. at 6.

None of the press coverage of the protest (including statements Ms. Maldonado made to the press) referred to Bennett's conviction.

Motion to disqualify Judge Giovan.

Ms. Maldonado's attorneys requested that Judge Giovan disqualify himself based on allegations that one of Ford's attorneys chaired a reelection fundraiser for the judge. Judge Giovan denied their motion on July 2, 2002. After that ruling, Plaintiff's attorney Miranda Massie told the press that "Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company." 8/21/02 Op. at 12.

Motion to dismiss.

On July 5, 2002, Defendants asked the court to dismiss Ms. Maldonado's case one two grounds: (1) prejudicial pre-trial publicity and (2) discourteous conduct towards the court.

On August 21, 2001, Judge Giovan dismissed Ms. Maldonado's case because she and her attorneys had publicly discussed Bennett's conviction. The court relied on "standards designed

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[2]A similar demonstration was held the following day at the Wixom plant, where protesters distributed a similar flyer. 8/21/02 Op. at 5-6 & Attachment B.

to prevent a trial from being infected by inadmissible evidence," and Model Rule of Professional Conduct ("MRPC") 3.6.[3] 8/21/02 Op. at 9. In this case, the court presumed that statements by Ms. Maldonado and her attorneys were "substantially likely to have a materially prejudicial effect" on the trial, because they were "designed to reach the farthest boundaries of the public consciousness." 8/21/02 Op. at 12. Although the court also suggested that Ms. Maldonado and her attorneys willfully violated MCL 780.623(5), a state statute limiting the publication of information about expunged convictions, it did not find the expungement statute controlling in the motion to dismiss. 8/12/02 Op. at 9.

Ms. Maldonado appealed the dismissal of her action to the Michigan Court of Appeals. On April 22, 2004, a panel of that Court issued an unpublished decision reversing that dismissal. *Maldonado v Ford Motor Co.,* Michigan Court of Appeals No. 243763.

Ford has now filed an Application for Leave to Appeal in this Court. On December 28, 2004, this Court issued an Order indicating that it would conduct oral argument on the question of whether Ford's Application for Leave should be granted. The Court in its December 28, 2004 Order also requested that the parties submit further briefing on this question. The Court's Order further indicated that among the issues to be addressed by the parties was "whether the Court of Appeals erred in reversing the Wayne County Circuit Court's dismissal of the case."

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[3]Rule 3.6. provides that a "lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Part (b) of the comment to Rule 3.6 provides that "[nowithstanding Rule 3.6 and paragraphs (a)(1)-(5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration . . . (2) the information contained in a public record" and "(6) a warning of danger concerning the behavior or a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest."

ARGUMENT

I. THE CIRCUIT COURT VIOLATED THE FIRST AMENDMENT RIGHTS OF MS. MALDONADO AND HER ATTORNEYS BY IMPOSING AN IMPERMISSIBLY BROAD RESTRICTION ON THEIR SPEECH ABOUT A PENDING LAWSUIT.

Questions of pre-trial publicity require courts to balance two important rights: trial participants' First Amendment rights and the due process right to trial by impartial jurors. Although this is no easy task, the ACLU submits that the trial court reached a lopsided result. It dismissed Ms. Maldonado's sexual harassment lawsuit because she and her attorneys publicly discussed a supervisor's conviction for indecent exposure. By presuming that their statements were substantially likely to prejudice the trial, however, the court surpassed the guidelines established by MRPC 3.6 and imposed an impermissibly broad restriction on speech. This section will first discuss what the court overlooked in its opinion: important policy considerations supporting lawyers' (and parties') speech about public aspects of sexual harassment lawsuits. It will then explain how the circuit court unjustifiably impeded these First Amendment interests when it punished speech outside the scope of Rule 3.6.

A. Speech about pending cases serves vital social interests.

It is well recognized that attorneys' speech about pending cases serves vital social interests. *See, e.g.*, Comment to MRPC 3.6 (noting interest in "the free dissemination of information about events having legal consequences and about legal proceedings"). Freedom to voice criticism about important areas of public concern – here, allegations of sexual harassment by a supervisor at Ford Motor Company – is central to this case. Lawyers bringing harassment charges play a unique role in exposing and halting abuses by persons in positions of power –

whether they are high-ranking politicians, *see Jones v Clinton*, or officials at large Michigan companies. When knowledgeable advocates discuss public aspects of harassment charges, they raise awareness of discrimination in the workplace and help prevent future violations. Their statements may be amplified, moreover, when victims of harassment join them in voicing public complaints.

Here, the value of informing others about Bennett's conviction extends far beyond Ms. Maldonado's case. It warns other women of the danger posed by Bennett, as well as the danger of working for an employer who retained a superintendent after he was convicted of a sex offense. Sharing this information with other women allows them to guard against similar instances of harassment–they may take steps to avoid Bennett and to avoid working for Ford. Indeed, Ms. Maldonado voiced this precise concern at her deposition, where she explained that she talked about Bennett's conviction because he "is a menace and ... must be stopped." 8/21/02 Op. at 5 (citing June 24, 2002 Deposition).

Publicity, moreover, encourages others who have witnessed Bennett's behavior (or Ford's reaction thereto) to come forward and testify. Publicizing trial proceedings "aids accurate factfinding" by bringing the proceedings "to the attention of key witnesses unknown to the parties." *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 596-97 (1980) (Brennan, J., concurring). Accurate factfinding will help ensure that employers who tolerate sexual harassment are punished and deterred from future violations. It will also reward employers who implement lawful policies against sexual harassment, and encourage them to adhere to those policies in the future. As Judge Rosen has noted, open discussion of sexual harassment charges provides a helpful "means of enforcing [an employer's] sexual harassment policy as well as

reinforcing that sexual harassment is a serious offense that will not be tolerated in the workplace." *Minnis v McDonnell Douglas Technical Services Co.*, 162 F Supp 2d 718, 742 (ED Mich 2001) (recognizing qualified privilege to communicate harassment charges in the context of a defamation claim.)

Finally, public discussion of Bennett's conviction raises awareness that Ford may tolerate unlawful behavior by its supervisors. Employees who fear (or find) that Ford will turn a deaf ear to sexual harassment complaints may question whether Ford has itself adopted an unlawful practice of ignoring valid complaints. Indeed, news of Bennett's conviction motivated another plaintiff, Pamela Perez, to file her own sexual harassment suit against Ford and Bennett: "Finding out about the girls on I-275 really, really bothered me," [she said] "They [Ford] knew that and they didn't do anything. That's what made me come forward." 6/12/02 MetroTimes article; Ex. C. to Def. Motion to Dismiss. Thus, discussion of Bennett's conviction serves the important function of raising other employee's awareness of their legal rights. *See generally In re Primus*, 436 US 412, 431 (1978) (noting that the First Amendment protects statements "advis[ing] another that [her] legal rights have been infringed") (internal quotation omitted).

The benefits described above all depend on participants' ability to speak freely during the lengthy pre-trial period of a civil lawsuit. The safety of other potential victims, the notification of key witnesses, and increased awareness of legal rights would all suffer if courts required plaintiffs and their attorneys to refrain from speaking about a superintendent's criminal record until after trial. The trial court never considered the value of this speech when it punished Ms. Maldonado and her attorneys under Rule 3.6. As explained below, this omission led the court to an unduly broad application of that rule.

B. The circuit court failed to recognize that ethical restrictions must be narrowly tailored to accommodate First Amendment interests.

Although the First Amendment does not guarantee attorneys absolute freedom to speak about pending litigation, *Gentile v State Bar of Nevada*, 501 US 1030, 1074 (1991),[4] it does place "significant restrictions on the power of courts to control" such speech. Rodney A. Smolla & Melville B. Nimmer, *Smolla and Nimmer on Freedom of Speech* §15:42, p.15-56 (1996). Thus, limitations on attorney speech must be "narrow and necessary." *Gentile*, 501 US at 1075. The Supreme Court in *Gentile*, emphasized the importance of narrow tailoring when it found the same ethical standard as that adopted in MRPC 3.6[5] constitutionally permissible: it noted that the "regulation of attorneys' speech is limited–it applies only to speech that is substantially likely to have a materially prejudicial effect." 501 US at 1076. A broader restriction on attorney speech would unjustifiably intrude upon First Amendment rights–especially in a civil trial where "fair trial" concerns command less weight than in criminal cases. *Chicago Council of Lawyers v Bauer*, 522 F2d 242, 258 (7th Cir. 1975) ("mere invocation of the phrase 'fair trial' does not as readily justify a restriction on speech when we are referring to civil trials"). As explained below,

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[4]In *Gentile*, Chief Justice Rehnquist delivered the opinion of the Court with respect to Parts I and II, concluding that the "substantial likelihood of material prejudice" test in Nevada Supreme Court Rule 177 satisfies the First Amendment. 501 U.S. at 1063-77. Justice Kennedy delivered the opinion of the Court with respect to parts III and VI, concluding that Rule 177, as interpreted by the Nevada Supreme Court, is void for vagueness. *Id.* at 1048-51, 1058.

[5]The version of Nevada Supreme Court Rule 177 considered by the Supreme Court and MRPC 3.6 contain identical language. Both prohibit statements with a "substantial likelihood of materially prejudicing an adjudicative proceeding." See Appendix B to J. Kennedy's opinion in *Gentile*, 501 US 1060-62 (text of Rule 177) & MRPC 3.6. The only difference between Rule 177 and Rule 3.6 is that Rule 177 incorporates the ABA's model provisions (including safe harbor provisions) in its text, while Rule 3.6 includes the model provisions in a comment following the rule. *Id.*

the trial court's ruling runs afoul of this requirement.

The trial court punished speech that falls outside of the narrow (and permissible) limitations on attorney speech in MRPC 3.6. After noting that its ruling was based on "standards designed to prevent a trial from being infected by inadmissible evidence," the circuit court presumed that statements by Ms. Maldonado and her attorneys were "substantially likely to have a materially prejudicial effect" because they were "designed to reach the farthest boundaries of the public consciousness" 8/21/02 Op. at 9, 12. However, an examination of their statements does not support the substantial likelihood of prejudice required to support such punishment under Rule 3.6.

The circuit court failed to recognize, as an initial matter, that statements about the conviction concerned matters of public record[6] and warnings of danger concerning Bennett's and Ford's behavior–both of which fall within the safe harbor provisions of the comment to Rule 3.6. The safe harbor provisions provide that such statements are permissible regardless of their evidentiary status: lawyers may state without elaboration the "information contained in a public record" and "a warning of danger concerning the behavior of a person involved" "[n]otwithstanding Rule 3.6 and paragraphs (a)(1-5) of this portion of the comment." *See* Comment to Rule 3.6, at (b), (b)(2) & (b)(6). Thus, this safe harbor provision provides an explicit exception to the comment's earlier warnings, in parts (a)(1) and (a)(5), against statements about "the criminal record of a party" or "information ... likely to be inadmissible as evidence."

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[6]Bennett's conviction appeared in public records throughout the pre-trial period. It was not expunged until after Ms. Maldonado's attorneys issued a press release in Fall of 2001, and in Spring of 2002 it appeared in public court documents and transcripts debating its admissibility into evidence.

The circuit court's disregard for Rule 3.6's safe harbor provisions is in itself sufficient to establish that it imposed an overly broad restriction on speech. Also troubling, however, is that court's willingness to impose punishment based on statements made far in advance of its final evidentiary ruling, and its apparent displeasure over Ms. Maldonado's participation in a protest outside of Ford.

Ethical restrictions that suppress attorney speech for long periods before and after civil trials are constitutionally suspect. *Chicago Council of Lawyers v Bauer*, 522 F2d 242, 258 (7th Cir. 1975) ("broad time span of rule relating to [lawyers' public statements about] civil matters is an influential rule weighing against its constitutionality.") Here, all of the statements that resulted in press reports of Bennett's conviction were made in preliminary phases of the proceedings, *before* the circuit court issued a final ruling excluding the conviction from evidence. The attorneys' press release, which the court found extremely disturbing, see 8/21/02 Op. at 7 & Attachment C, was issued as early as Sept. 11, 2001. This was many months before Ford's attorneys requested a gag order, many months before the circuit court judge made his final evidentiary ruling, and many months before Ford's attorneys requested dismissal based on pre-trial publicity. Indeed, on May 17, 2002, the court refused to enter a gag order directing Ms. Maldonado and her attorneys to refrain from publicizing Bennett's conviction.

The court also focused on a handful of events occurring after its final evidentiary ruling. 8/21/02 Op. at 5-6. These include Ms. Maldonado's discussion of the conviction at her June 24, 2002 deposition, her participation (along with attorney Jodie Masley) in a protest outside of Ford, and flyers that the Justice for Justine committee circulated at the protest. *Id.* While Ms. Maldonado's statements and defiant attitude may have raised the court's ire, they are not

censurable as statements substantially likely to prejudice the trial under Rule 3.6. Ms. Maldonado's speech is not subject to Rule 3.6, as an initial matter, because that provision regulates only statements by a "lawyer." Additionally, none of Ms. Maldonado's statements (or statements or actions of others at the protest) resulted in media reports discussing Bennett's conviction. To the contrary, Ms. Maldonado's statements to the press at her protest were limited to a basic statement of her complaint and her determination to fight sexual harassment.[7] Finally, the protesters handing out flyers describing Bennett's conviction aimed them at Ford employees–not jurors. They did not repeat information about the conviction in larger signs that they waved before the media.

Thus, the statements upon which the circuit court judge based his punishment fall outside the narrow restriction established by Rule 3.6, and amount to an unjustified intrusion onto the free speech rights of Ms. Maldonado and her attorneys.

II. THE CIRCUIT COURT PUNISHED MS. MALDONADO AND HER ATTORNEYS UNDER AN UNCONSTITUTIONALLY VAGUE STANDARD.

The trial court also failed to notify Ms. Maldonado and her attorneys that their statements could lead to the severe sanction of dismissing their lawsuit. Their suit was dismissed after the court refused to enter a gag order prohibiting them from discussing the conviction, and without any warning against statements that appear to be protected by the safe harbor provisions of the comment to Rule 3.6. The vague standard applied by the court conflicts with the due process

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[7]The statements recounted in Ms. Maldonado's deposition testimony were equally innocuous. Although she stated "I won't shut up about [Bennett's conviction]," Ms. Maldonado clearly indicated that her statements were for the legitimate purpose of warning others "because [Bennett] is a menace and must be stopped." 8/21/02 Op. at 5 (citing Ms. Maldonado's June 24, 2002 Deposition).

requirements set forth in *Gentile v State Bar of Nevada*, 501 US 1030, 1048 (1991). If the court's ruling is allowed to stand, it will provide a harmful precedent for future cases. A precedent that allows courts to selectively ignore safe harbor provisions for attorney speech–without notifying the attorneys – would undoubtedly have a chilling effect on speech. Attorneys would refrain from permissible, valuable, speech for fear that it would lead to punishment. *See Grayned v. City of Rockford*, 408 US 104, 109 (1972) ("Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked"). Punishment under vague standards would also allow viewpoint discrimination, as courts could apply heightened standards to those advocating an unpopular position.

Thus, the circuit court's ruling must be reversed because it fails to meet the requirements of due process. Due process requires that restrictions on attorney speech provide "fair notice to those to whom [they are] directed," and that they avoid standards "so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 US 1030, 1048, 1051 (1991) (citing *Grayned v. City of Rockford*, 408 US at 112). Here, neither Ms. Maldonado nor her attorneys had notice that they would be punished for statements permitted in the comment to Rule 3.6. The court's decision, moreover, to punish Ms. Maldonado and her attorneys while ignoring similarly problematic statements made by Bennett's attorney suggests discriminatory enforcement. The discussion below will explain in more detail the holding of *Gentile* and why it conflicts with the trial court's ruling here.

The Supreme Court in *Gentile* reviewed a disciplinary decision under Nevada's regulations governing attorney speech. The Nevada Supreme Court disciplined attorney Gentile

for a press conference that appeared to be protected under a safe harbor provision in Rule 177(3) of Nevada's ethical code.[8] 501 US at 1048. The U.S. Supreme Court reversed and held that the Nevada court punished Gentile under an unconstitutionally vague standard. *Id.* at 1048-51. The safe harbor provision of Rule 177(3) misled Gentile into believing that his speech at the press conference was protected. The text of Rule 177 afforded him the right to explain the "general" nature of the defense without "elaboration," and, absent a clarifying interpretation by Nevada courts, Gentile was left to guess at the scope of protected speech. *Id.* at 1048-49. Thus, the standard was unconstitutionally vague because it failed to provide Gentile with sufficient notice of statements that he could make in public. *Id.*

The circuit court's decision raises the same vagueness concerns as the Nevada Supreme Court's disciplinary decision in *Gentile*. The circuit court dismissed Maldonado's case because she and her attorneys publicly discussed Bennett's conviction. It did not address safe harbor provisions that appear to permit these statements, see Comment to Rule 3.6, (b)(2) & (b)(6), or the possibility that these provisions misled Maldonado and her attorneys into believing that their statements about Bennett's conviction were protected.

More disturbing, however, is the court's failure to notify counsel that it intended to

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[8]Rule 177(3) of Nevada's ethical code contained the same safe harbor provisions as those provided in the comment to MRPC 3.6. At issue in *Gentile* was the provision allowing attorneys to "state without elaboration...the general nature of the...defense." 501 U.S. at 1048 (quoting Nevada Supreme Court Rule 177(3)). The Nevada rules provided that such statements could be made "notwithstanding" the fact that they also addressed the "character, credibility, reputation or criminal record of a ...witness;" and even if the lawyer "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* (quoting Nevada Supreme Court Rule 177(1)-(3)). Gentile gave a press conference in which he attempted to offer a general statement of his defense under Rule 177(3)'s safe harbor provisions, even though his discussion included statements that questioned the credibility of government witnesses. *Id.* at 1048-50.

disregard these safe harbor provisions and punish them for violating MRPC 3.6. On May 17, 2002, when defense counsel requested a gag order to prevent plaintiffs' counsel from publicizing Bennett's conviction, Plaintiff's attorney George Washington told the circuit court judge that he and his client had "every right to continue to publicly disclose the fact of the conviction." 8/21/02 Op. at 9. The court declined to enter a gag order.

The circuit court later explained "the Rules of Professional Conduct govern what counsel can say about pending litigation . . . without the need for reinforcement by the court." *Id.* at 9 n.4. But without a gag order (or directive to comply with the court's broad interpretation of the Rules of Professional Conduct) plaintiffs' counsel proceeded under the assumption that they were free to discuss Bennett's conviction. As of May 17, therefore, the court gave no indication that it would punish them for previous statements publicizing Bennett's conviction. Nor did it suggest that it would apply a heightened standard in the future–to the limited number of times they mentioned Bennett's conviction later in the case. Even by June 21, when the court finally mentioned the possibility of dismissing the case or granting a default judgement, it failed to articulate a standard other than directing counsel to avoid "violating that ethical obligation." 6/21/02 Tr. pp. 29-30. Indeed, without a gag order, it is not clear that Ms. Maldonado herself had notice of any limitations on her speech, because the Rules of Professional Conduct are directed towards attorneys.[9]

The court's selective discipline under Rule 3.6, moreover, raises troubling questions of

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[9]Ms. Maldonado's statement at her June 26, 2002 protest does not reflect notice that public discussion of Bennett's conviction would lead to disciplinary measures. Although she said "[i]f we don't act the way [Judge Giovan] wants . . . then he'll dismiss my case with prejudice," 8/21/02 Op. at 6, her statement was made well after any statements to the press regarding Bennett's conviction.

discriminatory enforcement. According to the Supreme Court, the "prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, *Kolender v Lawson*, 461 US 352, 357-58 (1983); *Smith v Goguen*, 415 US 566, 572-73 (1974), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile*, 501 US at 1051.

Discriminatory enforcement is a real concern here. Not only did the court ignore safe harbor provisions that appeared to protect speech by Maldonado's attorneys, but it did so after these attorneys accused Detroit-area judges of unfairly favoring Ford Motor Company. 8/21/02 Op. at 12 (noting attorney Massie's statement "it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company.")

The court was also more tolerant of statements made by defense counsel. Although attorney Morgan repeatedly told the press that Ms. Maldonado's sexual harassment claim was a lie,[10] his statements were never punished by the court. It is, of course, possible that Morgan's public discussion of Ms. Maldonado's credibility reflects the general nature of his defense–as permitted by safe harbor provision (b)(1) in the Comment to MRPC 3.6. What is troubling is the fact that Ms. Maldonado and her attorneys *were* punished for statements that also appear to be covered by Rule 3.6's safe harbor provisions. The due process clause will not tolerate standard so vague that it allows courts to apply safe harbor provisions to some parties but not others. When speech restrictions are enforced, they should be limited to clear, neutral standards designed to protect the legitimate interest in a fair trial. The circuit court failed to apply such

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[10]10/10/01 United Press International article, Def. 7/9/02 Submission of News Articles; 6/12/02 MetroTimes article; Ex. C to Def. Joint Motion to Dismiss.

standards here, and his dismissal of Maldonado's case should be reversed because he applied an unconstitutionally vague standard.

III. MCL 780.623(5) DOES NOT PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE CIRCUIT COURT'S FINDING OF MISCONDUCT.

As set forth above, the circuit court's finding of misconduct cannot be supported under MRPC 3.6. Nor should it be affirmed on the alternative ground that Ms. Maldonado and her attorneys violated MCL 780.623(5), a state statute limiting publication of information about expunged convictions. Although the trial court ultimately (and correctly) decided that the "expungement statute is not a controlling issue" in defendants' motion to dismiss, 8/21/02 Op. at 9, it is important to explain why section 623(5) does not reach statements made by Ms. Maldonado and her attorneys. The text of section 623(5) is ambiguous; however, it should not be construed (as the trial court assumed it would) to create a speech restriction applicable to the general public. Such a restriction would conflict with First Amendment interests, and therefore the broader interpretation of section 623(5) should be rejected. *See DeBartolo Corp v Florida Gulf Coast Trades Council*, 485 US 568, 575 (1988).

Section 623(5) provides that a "person, other than the applicant" is guilty of a misdemeanor if he or she "divulges, uses, or publishes information concerning a conviction set aside *under this section*." (emphasis added). MCL 780.623(5) also contemplates that certain state employees will have legitimate occasions to divulge, use, or publish information under section 623: it makes clear that such persons are not liable for statements permitted "as provided in subsection 623(2)." Section 623(5) is ambiguous, however, as to the overall scope of its liability. The text does not specify whether 623(5) merely prohibits unauthorized uses or

disclosures of expunged convictions by state employees acting "under this section," (e.g., those who use or divulge convictions in a manner not authorized by 623(2)), or whether it also bans the general public from using or divulging such information.[11]

The circuit court adopted the latter, more expansive interpretation of section 623(5) in its analysis. It assumed that section 623(5) prohibits "anyone other than the convicted person" or "department of state personnel" from using, publishing or divulging information concerning a conviction that has been expunged. 8/21/02 Op. at 9-10, n.5. Its understanding of section 623(5) should not be adopted, however, because it cannot pass constitutional muster under the First Amendment.

If section 623(5) applied to all members of the general public, it would restrict a broad range of protected speech, including political speech. For example, if the press learned that Governor Jennifer Granholm had an expunged conviction, it could not report that fact, even though the public has a vital interest in learning about the criminal record of elected officials. The trial court's understanding of section 623(5), moreover, conflicts with Supreme Court precedent protecting the general public's right to publish information about open court proceedings involving criminal matters. *See Cox v Cohn*, 420 US 469, 496-97 (1975) (state statute prohibiting publication of information contained in public indictment violated First

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[11]The text of section 523(5) is syntactically ambiguous, and, as a result, both interpretations are plausible. Under the first interpretation,"under this section" modifies the phrase "divulges, uses, or publishes information"–limiting 623(5)'s prohibition to state employees who use, divulge, or publish information about an expunged conviction in a manner not permitted by 623(2). Under the second interpretation, which was adopted by the circuit court, the phrase "under this section" modifies only the phrase "conviction set aside." Therefore the prohibition would extend to any person divulging or publishing an expunged conviction, regardless of whether they did so under the color of authority provided by section 623.

Amendment). To the extent that the underlying criminal conviction and expungement decision are resolved in open court, the state cannot punish the press or the general public from publishing their account of these proceedings. *Id.* Thus, the trial court's interpretation of section 623(5) should be rejected in favor of a narrower reading that is consistent with the First Amendment. *DeBartolo Corp v Florida Gulf Coast Trades Council*, 485 US 568, 575 (1988)("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to [legislative] intent"); Norman J. Singer, Sutherland's Statutes and Statutory Construction, Section 57:24, p. 75 (6th ed. 2001 rev.).

The only constitutionally permissible reading of section 623(5) limits its prohibition to statements made by state employees. It does not apply to the statements made by Maldonado and her attorneys or provide an alternative ground for affirming the trial court's finding of misconduct.

IV. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFF'S CASE BASED UPON AN *ASSUMPTION* THAT THE PRETRIAL PUBLICITY WOULD JEOPARDIZE DEFENDANTS' RIGHT TO A FAIR TRIAL WHERE VOIR DIRE WOULD HAVE REVEALED WHETHER THE PUBLICITY *ACTUALLY* DEPRIVED DEFENDANTS OF THEIR RIGHT TO A FAIR TRIAL.

Quite apart from the constitutional issues which have been addressed in this brief, there is another reason why the circuit court's decision dismissing Ms. Maldonado's case was properly reversed. The circuit court ruled that dismissal was proper based on an improper *assumption* that the pretrial publicity generated in this case jeopardized the defendants' prospects of a fair trial when the court could have determined at voir dire whether the jury pool was *actually* so infected as to deprive defendants of a fair trial.

The ACLU recognizes that there are competing concerns of a constitutional dimension at issue in this case. The ACLU recognizes that defendants have a due process right to a fair trial and it supports that right. Thus, the ACLU does not object to the circuit court's consideration of the defendants' right to a fair trial in addressing the issues before it.

Amicus curiae does, however, challenge the circuit court's balancing of the competing constitutional interests that are involved in this case. The circuit court in discussing Ms. Maldonado's case cited pretrial publicity and pretrial statements attributed to plaintiff's counsel which were made some time before the case was ready for trial. The court entertained a pretrial motion to dismiss the case on the basis of these statements and it ruled that the defendants' interest in a fair trial overcame any First Amendment rights which plaintiff and plaintiff's counsel may have possessed. However, in making its ruling that the defendants' right to fair trial had been undermined, the circuit court operated exclusively on the basis of an assumption. The court was willing to assume that the pretrial publicity unfairly infected *any* potential jury impaneled in this case.

The circuit court's reliance on this assumption of prejudice as a basis for taking the drastic measure of dismissing Ms. Maldonado's entire cause of action constitutes reversible error. This case never proceeded to a trial. As a result, the circuit court never had the opportunity to address whether the statements which it found to be inappropriate did, in fact, jeopardize the defendants' right to a jury which was untainted by this pretrial publicity. Quite obviously, one of the purposes of the *voir dire* which would have been conducted in this case would have been to determine this precise question - whether the defendants could obtain a fair and impartial jury. There was simply no need under the circumstances of this case for the circuit

court to engage in an assumption about what the pretrial publicity could do in terms of harming the defendants, since there was a mechanism which the trial court could employ to precisely determine this question.

This matter was to be tried in Michigan's most populous county. The trial in this case was not to take place until some time after the publicity which formed the basis for the circuit court's decision. Clearly, there are cases – both criminal and civil – that receive considerably more public attention than the present case where, through voir dire, the parties and the court are able to pick a fair jury. Since the speech of plaintiff and plaintiff's counsel implicates fundamental First Amendment concerns, it is, at the very least, necessary in any balancing of the competing concerns that the circuit court determine not simply whether the pretrial publicity *might* deprive the defendants of a fair trial, but whether that publicity *actually* undermined the defendants' right to a fair and impartial jury.

CONCLUSION

The circuit court's ruling amounts to an unjustifiable intrusion upon the First Amendment rights of Ms. Maldonado and her attorneys. By punishing speech that falls outside the narrow regulations of MRPC 3.6, the circuit court undermined vital social interests arising from statements that enhance the safety of others, notify key witnesses, and raise awareness of legal rights. The circuit court also violated due process requirements when it punished Ms. Maldonado and her attorneys without a gag order or other notice of the broad restriction it intended to apply. If the trial court's due process violation goes unchecked, this precedent will have a chilling effect on a wide array of protected speech in future lawsuits. Therefore, the ACLU respectfully requests this Court not disturb the Court of Appeals' decision to reverse the circuit court's dismissal of Ms. Maldonado's lawsuit.

Respectfully submitted,

Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
Christine Chabot (P65506)
Attorneys for *Amicus Curiae*
American Civil Liberties Union
Fund of Michigan
60 West Hancock Street
Detroit, MI 48201

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